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October Term, 1992

MIGUEL DE GRANDY, *et al.*,
Appellants,
v.
BUDDY JOHNSON, *et al.*,
Appellees.

UNITED STATES OF AMERICA,
Appellant,
v.
STATE OF FLORIDA, *et al.*,
Appellees.

On Appeal From the United States District Court
for the Northern District of Florida

[redacted]
OF
[redacted] ATTORNEY GENERAL OF ARIZONA,
[redacted] ATTORNEY GENERAL OF
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ATTORNEY GENERAL OF TENNESSEE,
IN SUPPORT OF APPELLEES IN CASE NOS.
92-519 AND 92-758

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

Nos. 92-593, 92-767

MIGUEL DE GRANDY, *et al.*,
Appellants,

v.

BOLLEY JOHNSON, *et al.*,
Appellees.

UNITED STATES OF AMERICA,
Appellant,

v.

STATE OF FLORIDA, *et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of Florida

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BRIEF AMICI CURIAE OF GRANT WOODS, ATTORNEY GENERAL OF ARIZONA, MICHAEL J. BOWERS, ATTORNEY GENERAL OF GEORGIA, MIKE MOORE, ATTORNEY GENERAL OF MISSISSIPPI, ERNEST D. PREATE, JR., ATTORNEY GENERAL OF PENNSYLVANIA, AND CHARLES W. BURSON, ATTORNEY GENERAL OF TENNESSEE, IN SUPPORT OF APPELLEES IN CASE NOS. 92-593 AND 92-767

INTEREST OF AMICI

The States of Arizona, Georgia, Mississippi, Pennsylvania and Tennessee, like all other States, must reapportion their legislative districts following each decennial

census.[1] In undertaking this complex task, these States are committed to the letter and spirit of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 (1988), and, in particular, to its guiding premise that all citizens should have an equal opportunity to participate meaningfully in the electoral process. At the same time, these States' first-hand experience confirms that reapportionment is a complex and intensely political process in which the necessary accommodation of a host of political, demographic, and legal concerns precludes the view that there is any single "right" approach.

The instant case is important to these *Amici* because it presents the opportunity to resolve basic Section 2 issues that implicate their ability to exercise one of the most sovereign of all powers—the drawing of political districts. In particular, this case provides an important occasion to clarify that, for all of its laudable goals, Section 2 does not authorize courts to impose an absolute requirement that States maximize the representation of any particular group or to divest States of their constitutionally grounded discretion to strike a reasonable, good-faith balance among competing political and social concerns.

SUMMARY OF ARGUMENT

This case implicates two concerns of fundamental importance. The first is the profound national commitment, given voice in both the Fifteenth Amendment and the Voting Rights Act, that all citizens have an equal opportunity to participate in the electoral process and elect representatives of choice. The second is the equally basic proposition that "the Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts." *Growe v. Emison*, 113 S. Ct. 1075, 1076 (1993) (citing U.S. Const. Art I. Sec. 2).[2] Lying at the core of a State's

[1] The parties have consented to the participation of *Amici*; letters of consent are on file with the Clerk of this Court.

[2] *See also Upham v. Seamon*, 456 U.S. 37, 43 (1982), *reh'g denied*, 456 U.S. 938 (1982); *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978); *White v. Weiser*, 412 U.S. 783, 794-95 (1973).

sovereignty, the reapportionment process necessarily involves intensely local concerns and must accommodate a multitude of competing social, political, regional, and ethnic interests. *See, e.g., Davis v. Bandemer*, 478 U.S. 109, 128 (1986) (noting that "political considerations are inseparable" from this process).[3]

Amici believe that the court below has fundamentally misunderstood the interrelationship between these parallel national objectives. Purporting to apply the standard announced in *Thornburg v. Gingles*, 478 U.S. 30 (1978), the court held that Florida's carefully considered legislative reapportionment plan violated Section 2 of the Voting Rights Act because it provided for three majority Hispanic Senate districts instead of four and because it provided for two majority African-American districts instead of three. Similarly, the court found liability on the House side "in that more than nine Hispanic districts [could] be drawn without having or creating a regressive effect on black voters" in Dade County. Tr. VIII, 82, App. 203a. Put differently, notwithstanding the state legislature's comprehensive efforts to develop a rational apportionment plan that fairly accommodated Florida's ethnic diversity, explosive population growth, and complex political alignments—and notwithstanding the undisputed fact that those efforts were undertaken with an acute awareness of the legislature's responsibilities under the Voting Rights Act and with the active participation of representatives of every major ethnic group in the State—the court held the plan illegal because it provided fewer than the maximum number of possible Hispanic districts.

For several reasons, the court's liability determinations were plainly in error.[4] First, and dispositively, in the ab-

[3] *See also Gaffney v. Cummings*, 412 U.S. 735, 752-53 (1973); *White v. Weiser*, 412 U.S. at 794-95.

[4] In the judgment entered July 2, 1992, the court held that "[t]he State of Florida's state senatorial districts embodied in the 1992

sence of proof of intentional discrimination—which is not even remotely present here—persistent proportional representation is a complete defense to a Section 2 vote-dilution claim. That standard is plainly satisfied here. Thus, on the Senate side, it is uncontested that the plan affords both Hispanics and African Americans representation that is in proportion to their numbers in the Dade County area. Similarly, on the House side, it is undisputed that nine of the eighteen Dade County seats are allocated to "safe" Hispanic districts, reflecting a Hispanic voting population of approximately 50%.

Moreover, even if (as the United States belatedly contends) the appropriate frame of reference were the State of Florida as a whole, the result would be the same, at least with respect to Hispanic citizens. Published census data confirms that a plan designed to afford Hispanic citizens representation in proportion to their numbers would provide for *fewer* than three Hispanic seats in the Senate and for *fewer* than nine Hispanic seats in the House.

While these undisputed facts are themselves sufficient to preclude liability, the District Court's judgment is also premised on a basic misunderstanding of the legal standard for assessing Section 2 vote-dilution challenges to the creation of single-member districts. There is no basis for requiring States to draw the maximum number of theo-

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Florida Senate Plan do not violate Section 2 of the Voting Rights Act[.]." J.S. App. 5a. In the opinion entered July 17, 1992, which "memorializes and explains the court's rationale for its July 2, 1992 rulings," J.S. App. 24a, the court reached the opposite conclusion, holding that the state senate districts *do* violate Section 2 because the District Plan "dilutes the voting strength of Hispanics" and "African-Americans in Dade County and the surrounding areas." J.S. App. 54a-55a. In its July 17 opinion, however, the court imposed the State Senate Plan as a remedy, apparently on the view that any effort to cure the Section 2 violation would cause another such violation. J.S. App. 66a. For that reason, the ultimate result reached by the court in the Senate case should be affirmed, while the judgment with respect to the House plan should be reversed.

retically possible majority-minority districts without regard to other considerations, such as neutral redistricting criteria or the claims of competing, non-covered groups. Such an approach is facially inconsistent with the so-called "Dole proviso" in Section 2 of the Voting Rights Act, which states expressly that "nothing in this section establishes a right to have members of a protected class elected in numbers to their proportion in the population." 42 U.S.C. § 1973(b). Moreover, a *per se* maximization requirement cannot be squared with this Court's decisions, including *Thornburg v. Gingles*, 478 U.S. 30 (1986), as well as the more general premise that a Section 2 challenge requires an assessment of the "totality of the circumstances." 42 U.S.C. § 1973(b).

More fundamentally, requiring legislatures to elevate the maximization of majority-minority districts over all other considerations in redistricting perverts the purpose of the Voting Rights Act, which is to ensure that the "political processes are equally open to minority voters." *Chisom v. Roemer*, 111 S.Ct. 2354, 2363 n. 20 (1991) (quoting S. Rep. No. 417, 97th Cong., 2d Sess. 2, *reprinted in* 1982 U.S. Code Cong. & Admin. News 177-79 [hereinafter Senate Report]). Accordingly, this Court should clarify that in the single-member district context a covered group can prevail under Section 2 only where it can affirmatively show that its " 'opportunity to participate in the political process' *and* 'to elect representatives of their choice' has been infringed." *Id.* (quoting 42 U.S.C. § 1973 (emphasis added)). In making that showing, proof of the three *Gingles* factors is a necessary but not sufficient prerequisite to relief. Nor does evidence of actual or expected disproportionality between the group's voting strength and the number of representatives it elects provide an independent basis for a finding of liability. As this Court reaffirmed in *Chisom*—and as the legislative history of the 1982 Amendments plainly demonstrates —the so-called "results" test does not hinge on the predicted *outcome* of elections.

To be sure, in determining whether an infringement has occurred, courts should evaluate the actual or predicted results of elections, including disproportionate outcomes, as a means of determining if the objective evidence "supports an inference" that a covered group has been "shut out, *i.e.*, denied access—not simply to winning offices but to opportunity to participate in the electoral system."[5] But in the end "[t]he ultimate issue to be decided [must be] whether the political processes were equally open." Senate Report at 35, *reprinted in* 1982 U.S. Code Cong. & Admin. News 213. In the event a plaintiff has failed to carry this burden, as is the case here, a State should be free to redistrict without having its plan preempted or "micromanaged" by federal courts.

ARGUMENT

Regardless of whether the "frame of reference" is the Dade County area or the entire State, the Florida plan affords Hispanics representation in proportion to their citizen voting age population. Because proportional representation is a complete defense to a Section 2 claim, the Court need look no further to turn aside the challenge to both the Senate and House plans. Moreover, even were this defense unavailable, the District Court's liability finding would be without legal basis. Because the Dade County area's Hispanic and African-American citizens unquestionably have "an equal opportunity to participate in the political process," as that phrase was employed in Section 2 and the decisions it incorporated, the mere fact that the plan could have provided for marginally more representation provides a facially insufficient basis for invalidating the plan.

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[5] *Voting Rights Act: Hearings on S.53, S.1761, S.1975, S.1992, and H.R. 3112 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 810 (1982) (statement of Armand Derfner, head of the Voting Rights Project) [hereinafter Senate Hearings].

I. BECAUSE THE FLORIDA PLAN AFFORDS HISPANICS PROPORTIONAL REPRESENTATION, APPELLANTS' CLAIM FAILS AS A MATTER OF LAW.

As the Court reaffirmed this Term, "only if [an] apportionment scheme has the *effect* of denying a protected class the equal opportunity to elect its candidate of choice does it violate Section 2; where such an effect has not been demonstrated, Section 2 simply does not speak to the matter." *Voinovich v. Quilter*, 113 S.Ct. 1149, 1156 (1993) (emphasis added).[6] That conclusion, which is compelled by the legislative history,[7] reflects the view

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[6] A redistricting plan lacking a discriminatory effect can only violate the Voting Rights Act if it is the product of intentional discrimination, a circumstance not present here. *See, e.g., Baird v. Consolidated City of Indianapolis*, 976 F.2d 357, 360 (7th Cir. 1992) ("Unless black voters fare poorly compared with white voters in achieving their objectives (the election of candidates they prefer) they have not stated a claim *under section 2(b)*, although proof of intentional discrimination under section 2(a) remains an option.") (emphasis added), *cert. denied*, 61 U.S.L.W. 3771 (U.S. May 17, 1993).

[7] This Court's decisions in *White v. Regester*, 412 U.S. 755 (1973), and *Whitcomb v. Chavis*, 403 U.S. 148 (1971), which were explicitly codified in Section 2, Senate Report at 2, *reprinted in* U.S. Code Cong. & Admin. News 177-79, make clear that proof of minority underrepresentation was a necessary but not sufficient condition of a successful vote dilution claim. In *White*, for example, the Court said that, for a plaintiff to sustain a dilution claim, "it is *not enough* that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential," 412 U.S. at 765-66 (emphasis added), clearly implying that failure to prove underrepresentation would doom a plaintiff's dilution claim. *See also Whitecomb v. Chavis*, 403 U.S. at 149; *Chapman v. Meier*, 420 U.S. 1, 17 (1971) ("Whether such factors [indicating denial of access to the political process] are present or not, proof of lessening or cancellation of voting strength *must be offered.*"). *See* 1 Senate Hearings 819-20 (Prepared Statement of Armand Derfner) ("[A]mended section 2, like *White v. Regester*, applies only in that small category of places where there is no functioning system of politics for minority voters, where there *is* already severe racial division, and where it is simply impossible

expressed by six members of the Court in *Gingles*: "Persistent proportional representation is inconsistent with [the] allegation that the ability of [minority] voters . . . to elect representatives of their choice is not equal to that enjoyed by the white majority." 478 U.S. at 77 (Brennan and White, JJ.).[8] *See also id.* at 104 ("[A]s a general rule, ['consistent and virtually proportional minority electoral'] success is entitled to great weight in evaluating whether a challenged electoral mechanism has, on the totality of the circumstances, operated to deny [minority] voters an equal opportunity to participate in the political process and to elect representatives.") (O'Connor, J., Burger, C.J., Rehnquist, (now C.J.), and Powell, J.).

Under these principles, the district court's July 17, 1992 liability determinations were plainly incorrect. While the United States devotes much energy to its contention that the appropriate "frame of reference" for assessing proportionality is the State of Florida rather than the Dade County area, the distinction is entirely ephemeral on these facts. It is undisputed that three of the seven Senate Districts in the Dade County area (43%) will contain majority Hispanic voting age populations, and one of the seven (approximately 15%) will contain a majority African-American voting age population.[9] Be-

for minority voters to have any significant *opportunity* under the election system as it is . . . .") ; *accord, e.g., id.* at 287 (Memoradum of Ralph G. Neas, Exec. Dir., Leadership Conf. on Civil Rights).

[8] *Accord Nash v. Blunt*, 797 F. Supp. 1488, 1497-98 (W.D. Mo. 1992), *aff'd mem.*, 113 S.Ct. 1509 (1993) (No. 92-1249) (proof of "persistent proportional representation should defeat a Section 2 vote dilution claim"). *See also* Motion of the United States to Affirm in Part and Vacate in Part at 11, *Wetherell v. De Grandy* (No. 92-519) (endorsing same conclusion).

[9] In addition, it is also undisputed that another Senate district has an African-American voting age population of more than 33% and that, in the 1992 election, an African-American candidate of choice was indeed elected in that "influence" district.

cause 45% of the voting age population in the Dade County area is Hispanic and approximately 15% is African-American, these uncontested facts should end the matter—especially in light of the litigation position taken by the plaintiffs below.[10] *See, e.g.*, Tr. I, 52 (limiting vote dilution claims to Dade County). The relevant numbers on the House side are equally telling. Nine of the twenty districts in the Dade County area will contain majority Hispanic voting age populations, each of the nine seats will permit the Hispanic population to participate effectively in the political process, and approximately 45% of the voting age population in the Dade County area is Hispanic.

Even if the appropriate focus were the State of Florida as a whole, the outcome would be the same. Notwithstanding the United States' peculiar (and legally insupportable) objection to reliance on published Census data, it concedes that "Hispanics constitute 7.15% of the citizen voting age population of Florida" and that "if a plan has been designed to afford Hispanics representation in proportion to their numbers in the citizen voting age population, it would apparently have eight or nine Hispanic seats." (Nine out of 120 total House seats or 7.5%). Motion of the United States to Affirm in Part and Vacate in Part at 14. *Wetherell v. De Grandy* (No. 92-519).[11]

[10] Because a decennial reapportionment plan is, by definition, "new," evaluating proportional representation in this context is a matter of prediction rather than history. While the case thus differs from *Gingles* in this minor respect, the distinction is without significance. At no point have appellants contested the conclusion that the majority-minority districts in the Florida plan are all "safe" minority seats. Moreover, the historical experience also supports the same result: in the 1990 elections, three Hispanic and one African-American State Senators were elected from the Dade County area.

[11] Despite this concession, the United States asks this Court to affirm the District Court's liability determination on the grounds that Appellants failed at trial to introduce then-unavailable Census

Because, for the House side, the State's plan *does* provide for nine Hispanic seats, this concession of state-wide proportional representation is determinative. Similarly, because on the Senate side at least three of the 40 state-wide seats (7.5%) are Hispanic, a finding of proportional representation is also inescapable.

In this regard, as the United States again concedes, there is no basis for any suggestion that the relevant measure is the voting age *population* as distinct from the number of voting age *citizens*. *See* Mem. for The United States in Opp. to App. For Stay at 11, *Wetherell v. De Grandy*, No. A-32 (U.S. July 14, 1992). The Voting Rights Act expressly states that it is intended to protect the rights of "*citizens*" and to guarantee that minority voters do not have less opportunity than other "*members of the electorate*" to "elect representatives" of their choice. 42 U.S.C. § 1973 (emphasis added). That clear language is reflected in numerous decisions of this Court, which have invariably considered "voters" the relevant group for reapportionment purposes. *See, e.g., Gaffney v. Cummings*, 412 U.S. 735, 746-748 (1973) (stating that "'census persons' are not voters" and therefore "total population figures derived from the federal Census" need not be used as the standard); *see also Burns v. Richardson*, 384 U.S. 73, 91-93 (1966).[12] Accordingly, because

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data showing statewide citizenship levels. This request ignores Federal Rule of Evidence 201, which authorizes judicial notice of a fact "at any stage of the proceeding." The data is properly before this Court. Fed. R. Ev. 201(f).

[12] Put another way, for purposes of the analysis of voting strength, non-citizens are equivalent to persons too young to vote, and should be treated in the same fashion. *See City of Rome v. United States*, 446 U.S. 156, 186 n.22 (1980) "[c]urrent voting-age population data" are probative because they "indicate the electoral potential of the minority community"); *see also Wyche v. Madison Parish Police Jury*, 635 F.2d 1151, 1161-1162 (5th Cir. 1981). To include persons ineligible to vote on account of non-

the Florida plan provides for proportional representation of Florida's Hispanic citizens who are eligible to vote, the District Court's liability determinations were incorrect.

II. UNDER THE CONTROLLING LEGAL STANDARD, APPELLANTS HAVE NOT DEMONSTRATED, AND COULD NOT DEMONSTRATE, A VALID SECTION 2 CLAIM.

The District Court clearly erred in premising its *liability* determination on the assumption that the State failed to maximize the number of Hispanic and African American districts. Under the correct legal standard, the plaintiffs below have not demonstrated—nor could they demonstrate—a valid claim under Section 2 of the Voting Rights Act.

A. Section 2 Does Not Require a State Legislature to Maximize the Number of Majority-Minority Districts.

The critical issue in this case is not whether *more* effective minority districts *could* have been created in Dade County, but whether Section 2 *requires* that such districts be drawn. The lower court believed that, once political cohesion and racially polarized voting have been shown, the failure to draw the maximum number of minority districts in a single-member district reapportionment plan is tantamount to a violation of Section 2. For a host of reasons, this analysis is incorrect.

As a threshold matter, the approach adopted by the District Court constitutes precisely the sort of "per se" approach this Court has repeatedly condemned in Section 2 cases. *See, e.g., Voinovich v. Ouilter*, 113 S. Ct. at 1156 ("[E]lectoral devices . . . may not be considered

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citizenship in the statistical pool would significantly overstate the degree of Hispanic electoral potential. *See Burns v. Richardson*, 384 U.S. 73, 92-93 (1966).

per se violative of Section 2.") (citations and quotations omitted). *See also id.* at 1157 ("The *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim.").

The legal and practical basis for eschewing categorical rules in this area is not difficult to discern. Any other approach would foreclose States from considering the wide array of interests and policies that this Court has recognized may be accommodated when a State formulates an acceptable reapportionment plan. These considerations include "making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent" office holders, *Karcher v. Daggert,* 462 U.S. 725, 740 (1983), as well as the fair allocation of political power among a State's diverse political, ethnic, and racial communities. *See United Jewish Organizations v. Carey,* 430 U.S. 144, 167 (1977); *Gaffney v. Cummings,* 412 U.S. at 752-53. Such considerations, far from being merely unavoidable realities that must grudgingly be left to the States, are basic to a State's sovereignty—as explicitly recognized in Article I, Sec. 2 of the U.S. Constitution. Any rule that categorically deprived States of the power to weigh these vital matters would itself be constitutionally suspect.[13]

Put somewhat differently, a *per se* maximization rule would *require* Florida to focus exclusively on the treatment of one group—Hispanics—and to ignore other legitimate interests and constituencies. As this case illustrates well, such a requirement is especially unworkable in a multi-ethnic area like Dade County, which contains a significant number of individuals from more than one covered group. Unless the claims of the two (or more) protected classes are evaluated simultaneously—and are thereby, by definition, not maximized—the voting strength of one protected group will always be expanded at the expense of the other. This approach led the lower court to the anomalous conclusion that both Hispanic and African-American plaintiffs had stated Section 2 violations—but that neither were remediable because the allocation of an additional Senate district to either group would result in the loss of a district by the other group. Consequently, the District Court concluded that the reapportionment scheme it deemed the best available nevertheless violated Section 2.

[13] Among the potential costs of maximizing minority officeholding at the cost of all other considerations is the danger that political integration may be inhibited by categorizing individuals for political purposes along racial lines and sanctioning group membership as a qualification for office. *See* 1 Senate Hearings 1361 (prepared statement of James Blumstein) (describing such categorization as a racial "piece-of-the action approach"). It is unclear whether such balkanization redounds to the benefits of minorities, *United States v. Board of Supervisors,* 571 F.2d 951, 956 (5th Cir. 1978); in any event, it is not required by the Act, which seeks only to reduce barriers to entry into the political process.

An approach that leads to such incongruous results simply cannot be justified under the plain terms of the Act. To the contrary, a maximization requirement would necessarily vitiate Congress's mandate that a court consider the "totality of the circumstances" when evaluating a Section 2 challenge. 42 U.S.C. § 1973. Reflecting the statutory language, the legislative history of the 1982 Amendments enumerated a number of factors that must be assessed in deciding if the Act has been violated. Senate Report at 28-29, *reprinted in* 1982 U.S. Code Cong. & Admin. News 205-07. *See Gingles,* 478 U.S. at 44-45 (acknowledging need for careful consideration of these factors). Contrary to Congress' express intent, the District Court's maximization standard renders this entire analysis irrelevant.

Furthermore, the lower court's standard cannot be reconciled with the so-called "Dole proviso" "[t]hat nothing in [Section 2] establishes a right to have members of a protected class elected in numbers equal to their propor-

tion in the population." 42 U.S.C. § 1973(b). As a decision summarily affirmed by this Court only last month observes, the Dole proviso is determinative in another respect as well. The proviso's clear mandate precludes a finding that "Congress intended the Act to require maximum representation . . . [because] [t]he converse of such a requirement would be a continuing duty to minimize representation by majority groups—a concept probably more controversial than proportional representation, which . . . was specifically rejected by Congress." *Nash v. Blunt,* 797 F. Supp. at 1496.

This point is aptly illustrated by the House appellants' hypothetical involving a 10-district jurisdiction with 100 voters per district. Under such circumstances, a group comprising 50% of the population could be given control of up to nine of the ten districts, so long as their geographic dispersion was such that nine districts could be drawn containing 51 members of the group ($9 \times 51 = 459$). Were Section 2 construed to require maximization, state legislatures would have no choice other than to ensure that majority groups were afforded the *least* representation possible—which, quite plainly, was not the purpose of the Act.

As this Court has explained in a related context,

> To draw district lines to maximize the representation of [a particular group] would require creating as many safe seats for each [such group] as the demographic and predicted political characteristics of the State would permit. This in turn would leave the minority in each safe district without a representative of its choice.

Davis v. Bandemer, 478 U.S. at 130-131. There is no warrant in the Voting Rights Act for mandating that non-covered groups be placed, to the extent possible, in districts where they are denied any realistic opportunity to elect "a representative of choice."

Not surprisingly in light of the statutory language, the decisions construing it are uniformly inconsistent with a maximization requirement. *Gingles* itself, which focused on the "totality of circumstances" is, of course, directly contrary to the District Court's approach. Other decisions have rejected the lower court's analysis in even more categorical terms. *See, e.g., Nash v. Blunt,* 797 F. Supp. at 1497 (proving that "more minority-dominated districts could have been drawn" is not a substitute for the *Gingles* analysis).

Similarly, in both of the cases that were "codified" into law by Section 2, this Court rejected the view that "any group with distinctive interests must be represented in legislative halls if it is numerous enough to command at least one seat and represents a minority living in an area sufficiently compact to constitute a single-member district." *Whitcomb v. Chavis,* 403 U.S. at 156. *See also White v. Regester,* 412 U.S. 755, 758 (1973). Instead, the Court required "that there be proof that the complaining minority 'had less opportunity . . . to participate in the political processes and to elect legislators of their choice.'" *Davis v. Bandemer,* 478 U.S. at 136 (quoting *Whitcomb,* 403 U.S. at 149). Thus, both decisions "clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be." *Id.* at 130 (citing *Whitcomb* and *White*).

Finally, as Justice O'Connor's concurrence in *Davis v. Bandemer,* 478 U.S. at 159, recognized, a "preference for proportionality" such as that adopted by the District Court there challenges "the legitimacy of districting itself . . . [as] the voting strength of less evenly distributed groups will invariably be diminished by districting as compared to at-large proportional systems for electing representatives." Yet such a result would directly flout

this Court's oft-stated preference for single-member districts over at-large districts.[14] As such, "it would be peculiar to conclude that a vote-dilution challenge to the (more dangerous) multimember district requires a higher threshold showing than a vote-fragmentation challenge to a single-member district." *Growe*, 113 S.Ct. at 1076. That, however, is precisely the hurdle the District Court's standard would raise.

For all of these reasons, the District Court's maximization requirement constituted plain error. Thus, the only remaining question is whether, on this record, the plaintiffs below could make out a Section 2 violation under the correct legal standard. As we now show, that question can only be answered in the negative.

B. Appellants' Failure to Demonstrate That They Were Denied an Equal Opportunity to Participate In the Political Process Bars Their Section 2 Claim.

While incorrect on its own terms, the District Court's maximization requirement betrays a more fundamental misunderstanding of the requirements of Section 2 of the Voting Rights Act. By predicating its entire analysis on the expected *outcomes* of elections under the challenged plan, it ignored the central issue under Section 2: whether members of the plaintiff class "have less *opportunity* than other members of the electorate to *participate in the electoral process*." 42 U.S.C. § 1973(b) (emphasis added). As the statutory language, the legislative history, and a uniform body of this Court's decisions make clear, that inquiry—which turns on "access-related," as distinct from "outcome-predictive" considerations—is an independent prerequisite to relief.

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[14] *See, e.g., Growe*, 113 S.Ct. at 1076 ("We have . . . stated on many occasions that multimember districting plans, as well as at-large plans, generally pose greater threats to minority-voter participation in the political process than do single-member districts . . . which is why we have strongly preferred single-member districts for federal-court-ordered reapportionment.") (citations omitted).

To be sure, a substantial disparity between minority population and the number of representatives that minority group may reasonably be expected to elect (assuming bloc voting is proven) may provide evidence that members of the minority are denied meaningful access to the political process if candidates preferred by the minority group are consistently defeated at the polls. But where, as here, (1) there is no evidence to suggest that plaintiffs are denied an opportunity to participate in the electoral process; (2) there is (to say the least) no substantial downward departure from proportionality; and (3) the record suggests that the redistrictng plan was based on rational, race-neutral criteria and developed pursuant to a good faith effort to comply with the Voting Rights Act, the analysis is at an end. In such circumstances, it is not the proper function of a federal court to subordinate a State's considered judgment to its own vision of electoral justice.

1. *Proof that a Covered Class is Denied An Equal Opportunity to Participate In The Electoral Process is a Prerequisite to Relief Under Section 2.*

All parties agree that the three "preconditions" set forth in *Thornburg v. Gingles, supra*, provide the starting point for the analysis in this case. *Voinovich*, 113 S.Ct. at 1157 (suggesting that *Gingles* factors apply in assessing single-member districts under Section 2); *Growe*, 113 S.Ct. at 1076 (same). Where appellees and the United States go astray, however, is in their tacit assumption that the *Gingles* factors constitute the end point as well. As the decisions in both *Voinovich* and *Growe* make clear, the *Gingles* factors are merely threshold elements of the plaintiff's *prima facie* case—necessary, but not sufficient conditions to proving liability.

That conclusion finds ample support in both the language of Section 2 and the reasoning of *Gingles*. Section 2

provides that the ultimate liability determination turns on "the totality of circumstances"—a universe of considerations that, by definition, is broader than the three preconditions identified in *Gingles*. Moreover, close examination of the preconditions themselves confirms their limited role in the overall inquiry. As the Court explained in *Growe*, "geographical compactness," minority "political cohesion," and "majority bloc voting" serve to identify situations where an alternative districting plan, as a practical matter, might *rectify* a plan that operates to deny a minority an equal electoral opportunity to elect representatives of choice. 113 S.Ct. at 1076. They, however, are only marginally useful in identifying whether a challenged plan *in fact* deprives a minority of its electoral rights. And they have virtually no bearing on whether members of the covered class "have less opportunity than other members of the electorate to participate in the electoral process." 42 U.S.C. § 1973(b).

Indeed, it is precisely that statutory predicate to liability that the District Court's analysis impermissibly submerges. To prevail in a Section 2 claim, a plaintiff class must demonstrate that it has "less opportunity than other members of the electorate to participate in the electoral process *and* to elect representatives of choice." *Id.* (emphasis added). Thus, "the inability to elect representatives of their choice is not sufficient to establish a violation unless, under the totality of the circumstances, *it can also be said that the members of the protected class have less opportunity to participate in the political process.*" *Chisom v. Roemer*, 111 S.Ct. at 2371 (emphasis added). As the Court further explained in *Chisom*, "It would distort the plain meaning of the sentence to substitute the word 'or' for the word 'and.'" *Id.*

By focusing exclusively on the number of "safe" Hispanic and African-American districts the various plans would create, the District Court simply ignored the "process" part of the inquiry at the expense of its overarching

concern with the sheer "number" of representatives Hispanics or African-Americans might expect to elect. This Court's parsing of the statutory language in *Chisom* makes plain that this approach is clear error. The pertinent question under the "process" component of Section 2 has nothing at all to do with outcome.[15] The question instead is "whether a particular group has been . . . denied its chance to effectively *influence* the political process." *Davis v. Bandemer*, 478 U.S. at 132-133 (emphasis added). Or as the Court phrased it in the decision expressly "codified" by Congress in the 1982 Amendments, "[T]he mere fact that one interest group or another . . . found itself outvoted and without legislative seats of its own provides no basis for invoking [a remedy] where, as here, there is no indication that this segment of the population is *being denied access to the political system.*" *Whitcomb v. Chavis*, 403 U.S. at 154-55 (emphasis added).

The District Court's error is traceable to a common, but erroneous, misunderstanding of the so-called "results" test adopted pursuant to the 1982 Amendments to the Act. It is certainly true that one of the primary purposes of the 1982 Amendments to the Act was to eliminate the requirement that a plaintiff document discriminatory intent in order to establish a Section 2 violation. Contrary to its somewhat inapt name, however, the "results" inquiry that supplanted the intent requirement does not authorize courts to base Section 2 liability determinations on the predicated outcome of elections. Instead, the purpose of the amendment was merely to substitute an "objective" analysis for a "subjective" one. In those extreme circumstances where a gross disparity exists between the

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[15] And, indeed, even under the second part of the inquiry, the Dole proviso precludes according the outcome (or expected outcome) of elections controlling weight—at least insofar as the plaintiff class is contending that it is entitled to proportional representation.

expected outcomes of the redistricting process and the covered group's voting strength, the objective evidence will undoubtedly show that the covered group had been impermissibly excluded from the political process—and, indeed, that degree of disproportionality may be strong evidence of such exclusion. But in the end, "[t]he ultimate issue to be decided [must be] whether the political processes were equally open." Senate Report at 35, *reprinted* in 1982 U.S. Code Cong. & Admin. News 213.

An examination of the legislative history of the 1982 Amendments confirms this interpretation. Proponents of the results test chiefly argued that the Court's holding in the *City of Mobile v. Bolden*, 446 U.S. 55 (1982) insulated discriminatory practices from review because of the difficulty of obtaining evidence regarding the subjective motivations of legislators, especially when the practices in question were adopted long ago.[16] These supporters of the results test proposed that the analysis be based on the various so-called "objective" factors identified in *White v. Regester* and pre-*City of Mobile* lower court cases applying that standard. Critics of the results test agreed, in essence, that a finding of unlawful vote dilution could and should be made based on the objective evidence but were concerned with, among other things, the potentially limitless scope of the test.[17]

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[16] *See, e.g.*, 1 Senate Hearings 199 (statement of Sen. Mathias); *id.* at 256, 265 (testimony of Benjamin L. Hooks, Exec. Dir. NAACP); *id.* at 290-91 (testimony of Vilma Martinez, Pres. MALDEF); *id.* at 813-19 (prepared statement of Armand Derfner). Another criticism was that the intent test created racial tensions by requiring a plaintiff to charge that a person was a racist before a violation could be established. *Id.* at 1181 (prepared statement of Arthur Fleming, Chairman, U.S. Comm'n on Civil Rights).

[17] The Subcommittee's Report contains a complete discussion of the results test. *See* Senate Report at 108-11, 127-58, 169-73, *reprinted in* 1982 U.S. Code Cong. & Admin. News 279-283, 298-331, 342-347.

Backers of the results test repeatedly assured those opposing it that the test was not a mandate for proportional representation,[18] and that it was simply to ensure that minorities were not effectively 'shut out' of the political process.[19] These proponents further contended that, given the heavy burden it placed on minority plaintiffs, the test would invalidate only those electoral practices that denied minorities an equal opportunity to partcipiate in the political process.[20] As Armand Derfner, head of the Voting Rights Project, put it, the "goal" of amended Section 2 "is to create an opportunity—nothing more than an opportunity—to participate in the political system." 1 Senate Hearings 821 (prepared statement).[21]

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[18] *See, e.g.*, 1 Senate Hearings 220 (prepared statement of Senator Kennedy) ("The courts have made clear that under the standard in our bill there is no right to a quota or to proportional representation, even in the context of at-large elections"); *id.* at 246 (Benjamin L. Hooks, Exec. Dir., NAACP); *id.* at 283, 287 (memorandum of Ralph G. Neas, Exec. Dir., Leadership Conf. of Civil Rights); *id.* at 796 (testimony of Armand Derfner, Voting Rights Project).

[19] 1 Senate Hearings 810 (prepared statement of Armand Derfner); *see also, e.g., id.* at 223 (prepared statement of Sen. Kennedy); *id.* at 626 (testimony of David Walbert).

[20] *See, e.g.*, 1 Senate Hearings 201 (testimony of Sen. Mathias); *id.* at 223 (prepared statement of Sen. Kennedy) ("effectively shut out of a fair opportunity [to] participate in the election"); *id.* at 810, 819-820 (prepared statement of Armand Derfner).

[21] Other supporters of the results standard made the same point. *See, e.g.*, 1 Senate Hearings 305 (prepared statement of Vilma Martinez, President, MALDEF) ("The issue then, is not proportional representation, but equal access to the political process"); *id.* at 372 (Laughlin McDonald, Southern Regional Dir., ACLU) ("What those [pre-*City of Mobile*] cases do is establish equality of access"). *See also id.* at 223 (prepared statement of Sen. Kennedy); *id.* at 275-76 (prepared statement of Benjamin L. Hooks, Pres. NAACP); *id.* at 283, 286-89 (memorandum from Ralph G. Neas, Exec. Dir., Leadership Conf. on Civil Rights); *id.* at 706 (memorandum from Frank R. Parker, Lawyer's Comm. for Civil Rights Under Law).

Senator Dole broke the deadlock between these two opposing forces by offering a compromise version of Section 2. That compromise introduced "additional language" incorporated from *White v. Regester* "delineating what legal standard should apply under the results test and clarifying that [this test] is not a mandate for proportional representation" 2 Senate Hearings 60 (statement of Senator Dole); *id.* at 58-59 (Additional views of Senator Dole). As Senator Dole put it, because his version of amended Section 2 "focus[es] on access to the process, not election results," 2 Senate Hearings 62, the question to be answered is "not whether [minorities] have achieved proportional election results," but "whether members of a protected class enjoy equal access. I think that is the thrust of our compromise: equal access, whether it is open; equal access to the political process." *Id.* at 60.

The legislative history makes clear that the Dole compromise embodied three areas of consensus. First, there was widespread agreement that direct evidence of intent to discriminate should not be necessary to establish a violation under Section 2. Rather, a claim of discriminatory vote dilution could be made based on objective factors. Second, a consensus emerged against allowing Section 2 claims to be based on a group's inability to achieve representation in proportion to its population within the jurisdiction. Instead, all agreed that proof of minority underrepresentation was a necessary but not a sufficient condition of a successful vote dilution claim, as the Court's decisions in *White* and *Whitcomb* had held. Third, it was understood that the concepts of unconstitutional vote dilution developed by this Court in *White* and *Whitcomb* and as applied in the lower courts prior to the *City of Mobile* should govern amended Section 2 cases.

These pre-*City of Mobile* decisions bear out the contention that Section 2 has been violated only where the minority group can prove that it "has essentially been shut out of the political process." *Davis v. Bandemer,*

478 U.S. at 139; *id.* at 151-52 (O'Connor, J., concurring). Thus, in *Whitcomb v. Chavis,* 403 U.S. at 148-149, the Court found "major deficiencies" in an approach that found an apportionment plan impermissible "because the proportion of legislators with residences in the ghetto elected from 1960 to 1968 was less than the ghetto's proportion of the population, less than the proportion legislators elected from Washington Township, a less populous district, and less than the ghetto would likely have elected had the county consisted of single-member districts."

Instead of focusing on the outcome of elections, the Court carefully examined the record to determine whether African-Americans had, in fact, been denied access to the political processes. It concluded:

> We have discovered nothing in the record or in the court's findings indicating that poor Negroes were not allowed to register or vote, to choose the political party they desired to support, to participate in its affairs or to be equally represented on those occasions when legislative candidates were chosen. Nor did the evidence purport to show or the court find that inhabitants of the ghetto were regularly excluded from the slates of both major parties, thus denying them the chance of occupying legislative seats.

Whitcomb v. Chavis, 403 U.S. at 149-50.

Similarly, in *White v. Regester,* the Court refused to rest on the outcomes of elections but instead found that the plaintiffs had carried their burden of "produc[ing] evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." 412 U.S. at 766.

The plaintiffs successfully bore this burden by showing that the "white-dominated organization" that was "in

effective control of [the] Democratic Party candidate slating in Dallas County . . . did not need the support of the Negro community to win elections in the county, and it did not therefore exhibit good-faith concern for the political and other needs and aspirations of the Negro community." *White v. Regester,* 412 U.S. at 766-67. They further established that "as recently as 1970 the [white Democratic organization] was relying upon 'racial campaign tactics in white precincts to defeat candidates who had the overwhelming support of the black community' " and that " 'the black community has been effectively excluded from participation in the Democratic primary process.' " *Id.* at 767. Accordingly, the Supreme Court sustained the district court's conclusion that the African-American community "was therefore generally not permitted to enter the political process in a reliable and meaningful manner." *Id.*[22]

Thus, the thrust of the cases endorsed in the legislative history was a careful analysis of whether objective facts indicated that the minority group had access to the political process—not whether, or to what degree, it was likely to prevail. *See, e.g., Dove v. Moore,* 539 F.2d 1152, 1155 (8th Cir. 1976) (upholding at-large system as lawful despite the fact that only one black alderman had ever been elected because "the record demonstrates that [blacks] play an active and significant political role in city politics"); *Black Voters v. McDonough,* 565 F.2d 1, 3 n.3, 6 (1977) (finding no dilution even though no blacks had ever been elected to School Board because "[b]lack candidates have carried Boston in other elections" and "a number of factors found by case law to minimize minority votes are missing from the record presented below"); *Hendrix v. Joseph,* 559 F.2d 1265, 1268

[22] This interpretation of *Whitcomb* and *White* is in accord with this Court's view of those cases. *See, e.g., Gingles,* 478 U.S. at 98 ("The 'results' test as reflected in *Whitcomb* and *White* requires an inquiry into the extent of the minority group's opportunities to participate in the political processes.") (O'Connor, J.).

(5th Cir. 1977) (finding no dilution because "[t]he very fact that there have been [minority] candidacies is 'suggestive of the fact that there is minority access to the nomination process,' " (quoting *David v. Garrison,* 553 F.2d at 929)); *David v. Garrison,* 553 F.2d 923, 930 (5th Cir. 1977) (reversing finding of dilution even though "there had been no blacks elected to any city or county office" because "there were no findings that, because of past discrimination, present black participation in elections is less than effective.").

This focus on access does not mean, of course, that a malevolent majority can simply pay lip services to a covered minority and claim that the minority group has been afforded access to the electoral process. These cases clearly establish that minorities have a right to participate fully in a political process in which they face no "built-in bias." Moreover, access was defined to mean not only the right to register and vote, but also the ability to join a political party, to participate in its affairs in a meaningful manner, and to become a candidate. Thus, while plaintiffs bear a substantial burden, it is hardly insurmountable, as cases like *White v. Regester* confirm.

Taken together, the statutory language, the decisions construing it, and the legislative history yield the following conclusions. A covered group asserting a Section 2 challenge to a single member districting plan must—in addition to satisfying the three *Gingles* preconditions —"demonstrate that its members have less opportunity than other members of the electorate to participate in the electoral process." 42 U.S.C. § 1973(b). Quite apart from the number of "representatives of choice" the group can expect to elect, it must show that it has been denied meaningful access to the process through which representatives are nominated and elected. While a substantial downward departure from actual (or predicted) proportional representation may serve as evidentiary support for such denial, more direct evidence of exclusion

may be found in the form of barriers to the nomination process or other limitations (*de facto* or otherwise) on minority candidacies, voting, or registration.[23] In the absence of such a showing, a state plan premised on neutral (albeit political) redistricting criteria should be accorded substantial deference. That deference should be at its zenith where, as here, the State has solicited the input of affected minorities and consciously crafted its plan in a good faith effort to meet its responsibilities under the Voting Rights Act.

2. *Appellants Have Not Demonstrated that the Florida Plan Denied Them an Equal Opportunity to Participate in the Electoral Process.*

Application of these principles in the instant case is straightforward. The District Court's conclusory assertion to one side, the record is devoid of any substantial evidence that Hispanics or African-Americans in south Florida (or the State as a whole) have "less opportunity than other members of the electorate to participate in the electoral process." 42 U.S.C. § 1973(b). To the contrary, the evidence supports precisely the opposite conclusion.

Far from being "shut out" of the process, Hispanics and African-Americans have enjoyed great success at all levels of government. Thus, for example, the previous governor of the State was of Hispanic origin, as are the Mayors of Miami and Hialeah. In addition, by the end of the 1980's seven Hispanics from Dade County held seats in the Florida House of Representatives, and two in the State Senate. Yet another was elected to the U.S. Congress from Dade County. Currently, Hispanics constitute a majority of the city commissioners in Miami, Hialeah, Sweetwater, and West Miami. Numerous others serve on the Dade County School Board and other county offices.

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[23] *See, e.g.*, A. Thernstrom, *Whose Votes Count?, Affirmative Action and Minority Voting Rights*, 197-231 (1987).

Similarly, by the end of the 1980s, for example, four African-Americans from Dade County held seats in the Florida House of Representatives, and another held a seat in the State Senate. Another African-American from Dade County was elected to the United States Congress in the 1992 election. African-Americans also serve as city commissioners in six different Dade County cities and numerous others serve on the Dade County School Board in other county offices.

To be sure, episodic electoral success by members of a covered group is not a complete answer to a Section 2 claim. Nonetheless, this impressive track record is utterly inconsistent with any suggestion that Hispanics or African-Americans are denied meaningful access to the political process.

That conclusion finds further support in the manner in which the Florida legislature went about the business of reapportionment. Acutely aware of its responsibilities under the Voting Rights Act, it endeavored to create a plan that would protect the rights of Florida's minority populations, while achieving a fair allocation of political power among all of the State's constituencies.[24] Towards that end, members of the Cuban and Black Caucuses served on the responsible committees and played an active role in every step of the process. Moreover, in the recent past the State had abandoned its use of multi-member districts for the express purpose of eliminating the risk of unfair dilution of the voting strength of its minority communities. *See In re Reapportionment Law*, 414 So. 2d 1040, 1045 (Fla. 1982).

Nor, of couse, can an inference of undue exclusion be predicated on the expected number of "safe" Hispanic or African-American districts under the challenged plan. As noted, it is undisputed that Hispanic and African-American citizens of both Dade County and the State as a

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[24] Testimony of Peter Wallace, Tr. VII, 164.

whole can be expected to elect representatives in proportion to their voting strength. But even if that were not the case, hardly do the numbers reflect the kind of gross disparity that might evidence diminished access to the electoral process.

Viewed against this backdrop, the contention that Hispanics and African-Americans are denied the "opportunity" to "participate in the electoral process" simply rings hollow. Florida's efforts to accommodate the immensely complex social, political, and ethnic interests within its borders in some respects may be imperfect—as is always the case given the "zero sum" nature of the enterprise. But to condemn its plan as a violation of Section 2 essentially on the grounds that the District Court preferred a marginally different approach stretches that provision well beyond its intended scope. Because such an approach is inconsistent with both the Act and basic principles of federalism, *Amici* respectfully urge that the decision in the Senate case be affirmed and the decision in the House case be reversed.

CONCLUSION

For the foregoing reasons, the decision below in the Senate case should be affirmed and the decision below in the House case should be reversed.

Respectfully submitted,

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